NO. 2676

United States
Circuit Court of Appeals
For the Ninth Circuit

W. B. PAINE, Trustee in Bankruptcy of the Estate of WISHKAH LOGGING COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

F. R. ARCHER, Receiver,

Respondent.

In the Matter of WISHKAH LOGGING COMPANY, a Corporation, Bankrupt.

Reply Brief

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Western District of Washington, Southern Division.

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REPLY BRIEF.

We deem it necessary to make a short reply to the motion to dismiss which has been filed by the respondent, F. R. Archer. The points or reasons

upon which he asks a dismissal will be taken up in this brief in the order in which they appear in the motion.

It is first set forth that the record or transcript is totally incomplete, first, in that the decision of Judge Cushman is not contained therein; second, that there is no itemized statement of taxes; third, that no claim for taxes ever was filed; fourth, that there is no evidence or testimony sent up.

The order sought to be reviewed, which is the final order in this matter, appears on pages 16 and 17 of the transcript on file. The opinion of Judge Cushman is not necessary to this petition and, furthermore, it is a decision of which this court will take judicial notice. While there is no itemized or particular statement of taxes claimed, yet the claim of the county appears in full on pages 12 and 13 of the transcript, and the purpose of petitioner in omitting the voluminous statements was solely to avoid greater expense to the fund which is practically exhausted by the order we now seek to review. It will be noted that in the precipe for transcript, all file marks were requested omitted. It must be the lack of file marks to which respondent takes objection, when he states that "no showing that any claim for taxes was ever filed." It is our understanding of the practice that transcripts may be made in this manner, and it is very apparent that this claim for taxes must have been part of the record to appear in the transcript as it does. Naturally, there is no testimony, or evidence sent up

inasmuch as this is a petition for revision under section 24b of the Bankruptcy Act, and is purely a question of law.

Respondent sets out, secondly, that no assignment of errors was filed, and that the transcript contains no assignment of errors.

Under the practice in such a procedure as this, no assignments of error other than those contained in the petition for revision are required. The Court will note, however, that in our petition for revision on pages 2 and 3, of the transcript, we particularly set forth two assignments of error.

As a third ground for dismissal, the respondent states that the petitioner, the Trustee, has no interest in whether or not the taxes are paid, and that Chehalis County, which claims the taxes, is not complaining. The Trustee has the duty and is obliged to administer this estate, and in some way discharge all claims filed. It is therefore the duty of the Trustee to see that all claims are justly handled, and that those having priority receive payment. As intimated in our opening brief, the Trustee may be held liable for interest and penalty on unpaid taxes if he has funds in his hands to discharge the same. The very fact that Chehalis County (Grays Harbor County, as it is now called) has filed in the bankruptcy court its claim for taxes, is an action susceptible of but one construction, and that is, that it claims these taxes and demands payment thereof as a priority. It will be noted that the claim for taxes has been endorsed "Preferred No. 1".

Respondent next sets forth that our petition for revision was filed too late. There is no statutory limit fixed, within which time a petition must be filed. While it is true that Judge Cushman rendered his decision on June 30th, 1915, yet the order by the referee for the payment of the fees to the receiver, the respondent herein, was not made and approved until October 25, 1915, and our petition for revision was made October 27th, 1915, (Tr. p. 3). Under these facts, it seems that we were as expeditious as possible in perfecting this petition. And under all the authorities, if our time began to run from June 30th, 1915, we are still within the time allowed by the court.

As a next ground for dismissal the respondent sets forth that the order to pay the receiver is based on the findings of fact that the receiver preserved the estate, and that there is no showing that taxes claimed were a charge or a first lien upon the estate. We admit, and particularly set forth in our petition for revision that the services of the receiver were beneficial, yet as a matter of law are junior to costs of administration and taxes. The incorporation in the transcript of the claim for taxes, (Tr. p. 12-13), is a showing that taxes were claimed and once being established constitute a first charge.

In further answer to the argument of respondent, we might say that the rules of court prescribe a clear and certain method by which to supplement the transcript, if the respondent feels it is insuf-

ficient or incomplete. It is apparent that the claim for taxes was presented because it appears in the record. It is further apparent that it was acted upon and disallowed because payment has never been made, and the payment of the receiver's claim will practically exhaust the fund.

Respondent takes exception to our failure to include the bills and statements for the taxes leaving the inference with the court that the taxes claimed are taxes on other property. This is not borne out by the record; in fact, the contrary appears, this being claim filed against the property of the bankrupt, Wishkah Logging Company. It is needless to answer the statement that a claim for $499 as taxes could not exist against an estate which in bankruptcy realized but $300.

In the argument upon the merits appearing on pages 4, 5 and 6 of respondent's brief, respondent has volunteered certain statements concerning the proceedings in bankruptcy court, which do not appear in the transcript, and are in no wise before this court. And it is apparent that if there were any basis for such statements, respondent would have filed a supplemental transcript. While any statement we may make regarding these statements or allegations made by respondent concerning the case will undoubtedly be de hors the record and unnecessary, yet we wish to make the following statement for what it may be worth:

The taxes claimed were assessed against property belonging to and owned by the bankrupt,

Wishkah Logging Company, at and prior to its adjudication, and that the property against which the taxes were so assessed did not pass to the mortgagee long prior to bankruptcy, but passed to the mortgagee after the Trustee was appointed, and as a result of a relinquishment after foreclosure in the Superior Court of Grays Harbor County.

Chehalis County has always urged its claim for taxes, and that it never filed a certificate nor did the county treasurer ever file a certificate showing that all the taxes or any taxes upon property which actually came into the hands of the Trustee had been paid. As a matter of fact, all these taxes were assessed against property which came into the hands of the Trustee and none of said taxes have ever been paid.

For the reasons above set forth, we feel that there is no merit in the motion made by respondent, and we further feel that the position taken by us in our opening brief is correct, and that the court below is in error.

Respectfully submitted,

G. R. SNIDER,
T. B. BRUENER,
Attorneys for Petitioner.